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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. [redacted] 2

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND AND JOSEPH H. LOOMIS, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MARTIN J. BERNARDS,
LENA BERNARDS,
Pro se.

INDEX.

Subject Index.

Cases Cited.

OTHER AUTHORITIES CITED.

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No. 54

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Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND AND JOSEPH H. LOOMIS, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Martin J. Bernards and Lena Bernards, the petitioners herein, appearing *pro se* under an application to proceed herein *in forma pauperis*, pray that a writ of certiorari issue to review the final order of the United States Circuit Court of Appeals for the Ninth Circuit, entered herein on March 22, 1940, denying petitioners' Motion and Petition to recall the mandate and to vacate and correct the judgment entered pursuant to the decision of the United States Circuit Court of Appeals for the Ninth Circuit rendered on May 2, 1939. This decision is reported in 103 F. (2d) 567.

Statement of Facts.

On August 10, 1934, petitioners commenced this proceeding in the District Court of the United States for the District of Oregon by filing a petition stating that they derived their entire income from farming operations conducted in Washington County, Oregon; that petitioners were unable to meet their debts as they matured; that they desired to effect a composition or extension under Section 75 of the Bankruptcy Act (11 U. S. C. A. Sec. 203); and that the schedules annexed to the petition contained a full and true statement of their debts and an accurate inventory of their property. The petition prayed that it be approved by the court, and that proceedings be had in accordance with said Section 75 (R. 1-2).

Included in the schedules were 16 parcels of real property in Washington County, Oregon, one of which was mortgaged to the respondent Collins and all of which were mortgaged to the respondent M. R. Johnson. The Johnson mortgage or some interest therein had been assigned to the respondent The United States National Bank. The debts secured by the mortgages were past due and suits to foreclose had been commenced in the State court. A foreclosure decree had been entered on the Johnson mortgage but suit was still pending upon the Collins mortgage when the petition was filed (R. 1-2).

On the date of filing the petition was approved by the court as filed in good faith and the cause was referred to a conciliation commissioner (R. 6). On December 19, 1934, petitioners filed an amended petition stating that they had failed to obtain the acceptance of a majority in number and amount of all of the creditors whose claims were affected by the composition or extension proposals, and asking to be adjudged bankrupts, under the provisions of subsection (s) of Section 75 of the Bankruptcy Act, and to have the benefits of said subsection (R. 9-13) On said date, De-

cember 19, 1934, an order of adjudication was entered under the provisions of said paragraph (s) and on December 20, 1934, the case was referred to a referee in bankruptcy (R. 14).

On the date of the first hearing before the referee, to wit, February 8, 1935, a petition was addressed to the judges of the court and to the referee asking for the appointment of appraisers and retention of possession of the property by the petitioners (R. 36-37). Pursuant thereto appraisers were appointed by the referee, but on May 27, 1935, before an appraisal was made, subsection (s) of said Section 75 was held unconstitutional by the Supreme Court. (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.) The proceedings herein were not dismissed but remained pending.

On June 29, 1935, a purported judicial sale of the real property was held under the foreclosure decree obtained by respondent Johnson in the State court and the property was bid in by respondents Johnson and The United States National Bank. On July 9, 1935, respondent Collins obtained a foreclosure decree in the State court and pursuant thereto a purported judicial sale was held on August 26, 1935, whereby the property mortgaged to respondent Collins was sold to said respondent. These sales were confirmed on July 20, 1935, and September 16, 1935, respectively.

On August 28, 1935, subsection (s) of Section 75 was amended. Frazier-Lemke Act of August 28, 1935, C. 792, 49 Stat. 942, 943. On September 30, 1934, petitioners filed their petition in the District Court reciting the proceedings theretofore had and reciting that the proceedings and documents in the possession of the referee should be transferred to the court to be referred to the conciliation commissioner for Washington County and asking for an order directing the referee to transfer to the court all documents and

records together with a report of all proceedings therein (R. 16-17).

On said 30th day of September, 1935, an order was made and entered by the court recalling the order of reference to the referee and directing the referee to transmit to the court all records, documents and proceedings in his possession together with a report of all proceedings had before him and further ordering that the proceedings be referred to the conciliation commissioner for Washington County (R. 17-18). Accordingly the referee transmitted to the court the documents and record of the proceedings including the amended petition of December 19, 1934, and the petition of February 8, 1935, for the benefits of the act including the appointment of appraisers, appraisal, and retention of possession by petitioners (R. 36-37). This latter petition was marked filed October 10, 1935, by the clerk of the court and forwarded to the conciliation commissioner together with the other documents. On October 15, 1935, an order was entered by the court referring the cause to the Conciliation Commissioner "to take such further proceedings therein as are required by said acts" and directing the bankrupts to attend before the Conciliation Commissioner and to submit to his orders or the orders of the court relating to the bankruptcy (R. 19).

No action was taken by the conciliation commissioner other than to hold the first hearing. On February 1, 1936, the respondents Collins, Johnson and The United States National Bank obtained possession of the mortgaged property by means of a writ of assistance issued out of the State court. Sheriff's deeds were delivered to respondents Johnson and Collins on July 1st, 1936, and September 10, 1936, respectively. On July 15, 1936, petitioners petitioned the conciliation commissioner for an order removing the mortgages from the premises and requiring them to account to the bankrupts for the crops (R. 19-21). On August 8,

1936, the commissioner denied the petition and ordered the appointment of a trustee (R. 49-53). On August 29, 1936, at a meeting of the creditors, respondent Loomis was elected by a minority of creditors and appointed by the commissioner as trustee in bankruptcy and qualified on September 3, 1936 (R. 54). Creditors holding majority in amount of claims refused to approve a trustee as shown by affidavits attached to petition (R. 25-29). The commissioner's orders appointing the trustee and approving his bond were reviewed and on December 15, 1936, were affirmed by the court (R. 24).

On January 4, 1937, petitioners petitioned the commissioner to remove the trustee and put petitioners into immediate possession of the whole of their estate and to proceed with appraisal of property (R. 25-27). At a hearing on January 11, 1937, the commissioner dismissed that petition (R. 30-31). At said hearing counsel for petitioners asked that Conciliation Commissioner whether or not in the proceeding had before him, he proceeded under the Frazier-Lemke Act of August 28, 1935, and the Commissioner replied that he had. The Commissioner was then asked whether he had appointed appraisers under said act and if so, whether an appraisal had been made, and the commissioner replied that an appraisement had been made and produced from the files a document of that tenor and effect (R. 81-82). The appraisals made (R. 58-61), and (R. 63-63) do not include personal property listed in petitioners schedules, the value of which is more than two-thirds of the total value of personal property (R. 39-47). No objection was ever made to the partial appraisal for the reason that the trustee appointed by the Commissioner (R. 54 and order of the District Judges confirming trustee (R. 24) took the property wrongfully from the possession of petitioners. On January 15, 1937, petitioners petitioned the court to reverse the commissioner's orders of August 8,

1936, and August 29, 1936, September 3, 1936, and January 11, 1937 (R. 77-87). In answer to the petition respondent Collins prayed that her title to the mortgaged property be quieted, respondent Johnson and The United States National Bank prayed that their title to the mortgaged property be quieted, and the trustee prayed that the acts done by him be approved and that he be directed to complete the administration of the bankrupts' estate by payment of expenses and distribution to creditors (R. 81-91, 91-100).

On January 29, 1937, petitioners filed a petition with the Conciliation Commissioner asking a review of the Conciliation Commissioner's order of January 11, 1937, which order denied petitioners' request to remove trustee (R. 33-34).

On April 13, 1938, petitioners filed a motion to vacate and set aside all orders of the court and of the referee and conciliation commissioner where it was sought to set aside or delay the carrying out of the provisions of section 75 of the Bankruptcy Act and that the cause be promptly reinstated without any additional filing fees or charges. This motion was based upon contentions as follows:

> 1. That the referee in bankruptcy and the conciliation commissioners had no jurisdiction to pass on the adjudication of bankrupts or the qualifications of bankrupts to come under Section 75 of the Bankruptcy Act.
>
> 2. That the referee in bankruptcy and conciliation commissioners had no jurisdiction to proceed until they had complied with the mandatory provision of the Bankruptcy Act and particularly the provisions and the amendments of Section 75 of the Bankruptcy Act.
>
> 3. That under the amendments of Section 75 of the Bankruptcy Act approved March 4, 1938, where the Conciliation Commissioner had improperly held new subsection (s) unconstitutional as applied to the land, petitioners were entitled to have the cause promptly reinstated without additional filing fees or charges.

4. That after adjudication no further affirmative action by the petitioners is necessary until the referee and conciliation commissioners had complied with the mandatory provisions of the Bankruptcy Act and particularly Section 75 (R. 34-35).

On May 10, 1938 the court entered an order confirming order of Conciliation Commissioner denying petitioners' petition of January 4th, 1937, which petition asked for the removal of the trustee (R. 39).

On May 10, 1938, the court made and entered findings of fact and ordered that petitioners' petition of January 15, 1937, be dismissed, granted the respondents the relief prayed for in their answer, and ordered that petitioners' motion of April 13, 1938, be denied (R. 37-39). In the findings upon which these orders were based the court found that the land was mortgaged, that foreclosure sales had been held, that there had been no redemption, that petitioners had made no attempt to comply with the conditions required of them in order to obtain the right and privilege of a three years' stay of enforcement of their obligations and the right to possession of their property; that at the time of filing their petition on December 19, 1934, and at all times thereafter, petitioners have been beyond all hope of financial rehabilitation and that the only effect of further proceedings on petitioners' behalf in the bankruptcy would be to postpone the inevitable liquidation of petitioners' financial affairs without benefit to them and resulting in great hardship to the creditors (R. 64-74).

No oral testimony was introduced in the District Court.

Thereafter petitioners prosecuted an appeal under section 24-B of the Bankruptcy Act to the United States Circuit Court of Appeals for the Ninth Circuit. On May 2, 1939, the Circuit Court of Appeals rendered its opinion and affirmed the orders entered in the District Court.

Thereafter petitioners made timely application to the Supreme Court of the United States for a writ of certiorari to review the judgment of the Circuit Court of Appeals aforesaid, and according to law the issuance of the mandate was stayed pending the disposition of the matter in the Supreme Court (R. 158).

On October 23, 1939, the petition for certiorari was denied without opinion. Immediately upon receipt of notice thereof, petitioners sought to obtain an Order withholding the mandate pending the anticipated decisions of the Supreme Court interpreting section 75 of the Bankruptcy Act. Upon information that the mandate had already issued, petitioners moved in the District Court to withhold the entry thereof and moved simultaneously in the Circuit Court of Appeals to have the same recalled and held (R. 159). This application was instantly denied (R. 160).

On December 4, 1939, Supreme Court handed down its decision in the case of *John Hancock Mutual Life Insurance Company* v. *Bartels*, 60 Supreme Court Rept. 221, 308 U. S. 180. As is hereinafter more fully developed, petitioners consider it to be controlling in the instant case and to require the correction of the decision of the Circuit Court of Appeals of May 2, 1939. Accordingly petitioners promptly filed in the Circuit Court of Appeals their motion and petition to recall the mandate and correct the judgment, upon the authority of the *Bartels* case (R. 160). On January 2, 1940, the Supreme Court rendered its decision in the case of *Kalb* v. *Feuerstein*, 60 Supreme Court Rept. 343). Petitioners believe the propositions decided in the *Kalb* case are absolutely determinative of the instant case and left the decision of the Circuit Court of Appeals of May 2, 1939, absolutely without foundation.

Accordingly the aforesaid Motion and Petition was supplemented to call the attention of the Circuit Court of Appeals to this decision. The matter then remained pending

in the Circuit Court of Appeals without action until March 22, 1940, when the Motion and Petition were denied without reason therefor being assigned (R. 162).

Reasons Relied Upon for the Issuance of the Writ.

Questions Presented.

I.

Does the exercise of sound discretion require a Circuit Court of Appeals to recall its mandate upon an appeal in bankruptcy and correct the judgment entered thereon where within 50 days after the entry of the mandate and during the term at which it was entered application for recall and correction was made to the Circuit Court of Appeals upon the basis of intervening decisions of the United States Supreme Court establishing error in the original decision upon which the mandate was based?

II.

After the filing of a petition for composition and extension under Section 75 of the Bankruptcy Act as amended, and during the pendency of the proceedings thereby initiated, are proceedings in the State Court automatically stayed?

III.

Where the original petition filed under Section 75 of the Bankruptcy Act is approved as filed in good faith and where an amended petition if filed under subsection (s) of Section 75 and is accepted by the court and an order of reference made, does the Court or Conciliation Commissioner have jurisdiction to deny the farmer debtors the benefits of the Act upon Arbitrary findings that the proposal for composition and extension was not made in good faith and that the farmer-debtors were unable to refinance themselves in three years or at all?

IV.

Assuming that orders appointing and confirming a trustee under Section 75 (s) of the Bankruptcy Act to be not void but voidable, then; where an order of the conciliation commissioner appointing a trustee was reviewed and confirmed on December 15, 1936, and where diligently thereafter on January 4, 1937, and before any intervening rights had accrued, and before the thirty day appeal period had expired, petitioners filed a petition with the conciliation commissioner asking removal of the trustee and its denial timely taken to the District Court for review on January 29, 1937, where it was affirmed on May 10, 1938; have the petitioners lost their right to appeal to the appointment of a trustee?

Statutes Involved.

This cause involves the construction of Section 75 of the Bankruptcy Act, 11 U. S. C. A. Section 203.

Reasons for Granting the Petition.

I.

The United States Circuit Court of Appeals for the Ninth Circuit has herein decided an important question of general law in a manner contrary to the great weight of authority and contrary to the decisions of the United States Supreme Court. This question relates to the general power and jurisdiction of a court over its judgments and orders, and its inherent power to correct error upon timely application. In denying petitioners' motion and petition to recall the mandate and correct the judgment, the Circuit Court of Appeals refused to correct error established by intervening decisions of the United States Supreme Court, as hereinafter shown.

In *Wayne United Gas Co.* v. *Owens Illinois Glass Co., et al.*, 57 Sup. Ct. Rep. 383, 300 U. S. 131 (1937), the United

States Supreme Court reiterated the rule that courts of law, equity and Bankruptcy may correct their judgments and orders upon timely application.

In *Bronson* v. *Schulten,* 104 U. S. 410, 26 L. Ed. 797, the United States Supreme Court, while denying the relief prayed for, held that the only judgments and decrees over which jurisdiction was lost by the expiration of the term were "final judgments". In the same case it was pointed out that where steps were taken within the term to have the error corrected, such judgments were thereby prevented from becoming final and jurisdiction thereof was not lost by the expiration of the term.

In the instant case the Circuit Court of Appeals for the Ninth Circuit, by denying petitioners' timely motion and petition to recall the mandate and correct the judgment, refused to comply with the requirements of sound discretion and refused to exercise the jurisdiction recognized by the Supreme Court in the cases referred to.

II.

The Circuit Court of Appeals for the Ninth Circuit has herein decided important questions of Federal law in a manner in conflict with the decisions of the Supreme Court. These questions relate to the stay of proceedings in the State courts while proceedings are pending in the Bankruptcy Courts under Section 75 of the Bankruptcy Act, and to the jurisdiction of a District Court to dismiss proceedings under subsection (s) of Section 75 of the Bankruptcy Act on the ground of bad faith, or inability to become financially rehabilitated.

By denying petitioners' motion and petition to recall the mandate and correct the judgment, the Circuit Court of Appeals in effect adhered to its decision of May 2, 1939, upon which the judgment was based. In that decision the Circuit Court of Appeals specifically held that the only stay

provided under subsection (s) of Section 75 of the Bankruptcy Act was the judicial rental stay order therein mentioned, and sanctioned the action of the District Court in denying petitioners the benefits of subsection (s) of Section 75 upon the ground of arbitrary findings of bad faith proposal and inability to become financially rehabilitated.

In *Kalb* v. *Feuerstein*, 60 Sup. Ct. 343, decided January 2, 1940, the Supreme Court held that the State courts have no jurisdiction to proceed while proceedings under Sec. 75 of the Bankruptcy Act are pending, using the following words:

> "No proceedings after the filing of the petition should be instituted, or if instituted prior to filing of the petition, should not be maintained in any court, or otherwise."

In *John Hancock Mutual Life Insurance Company* v. *Bartels*, Sup. Ct. Rep. Adv. Opinions, L. Ed. Vol. 84, p. 154, 300 U. S. 180, the Supreme Court specifically held that a District Court must follow the mandate of the Statute and cannot arbitrarily dismiss proceedings under subsection (s) of Section 75 on the ground of bad faith proposal or asserted inability to refinance.

The decision of May 2, 1939 rendered by the Circuit Court of Appeals is squarely in conflict with the recent holdings of the Supreme Court referred to, and upon timely application made, sound discretion required the Circuit Court of Appeals to correct its palpable error.

Petitioners are informed that of a large number of petitions for certiorari filed in the Supreme Court during the October, 1939 term to review questions relating to Section 75 of the Bankruptcy Act, only a representative few were allowed. Petitioners cannot believe otherwise than that the Supreme Court intended the decisions in the cases where certiorari was granted to be controlling in the other cases.

If this belief is true, the various Circuit Courts of Appeals, in the interests of justice, should not be permitted to circumvent this intention by arbitrarily adhering to their prior erroneous decisions in the face of timely application to correct the error. Justice to petitioners and those in like position establishes a need for an authoritative ruling by this Court and a decision herein will answer the need for uniformity and certainty requisite to the guidance of the inferior courts before which such questions are now and will ever be raised.

Wherefore, your petitioners, respectfully pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify to this Court, on a designated day, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals had in said cause, to that end that this cause may be reviewed and determined by this Honorable Court and that said final order of said Circuit Court of Appeals may be reversed, and for such other and further relief as the sound discretion of this Honorable Court deems the extreme emergency of this case requires.

MARTIN J. BERNARDS,
LENA BERNARDS,
Petitioners Pro Se.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS,
Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND AND JOSEPH H. LOOMIS, TRUSTEE.

A BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinion Below.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final order of that court denying petitioners' motion and petition to recall the mandate and correct the judgment issued and entered pursuant to the decision of that court on May 2, 1939, affirming separate orders in bankruptcy of the District Court of the United States for the District of Oregon. These orders of the District Court were not rendered under written opinion, but were based

upon findings and conclusions incorporated in the record. The written opinion of the Circuit Court of Appeals affirming the orders is hereinafter set forth in full. The order denying petitioners' motion and petition to recall the mandate and correct the judgment was rendered without opinion.

Jurisdiction.

Jurisdiction of this cause is based upon 28 U. S. C. A., Section 347, Judicial Code, Sec. 240 (s), as amended by the Act of February 13, 1925. The date of the order to be reviewed is March 22, 1940, and this petition is filed within sixty days from date thereof. The questions presented involve the construction and interpretation of Section 75 (s) of the Bankruptcy Act as amended.

Statements of Facts.

The facts in this cause are as set forth in the accompanying petition for certiorari. We wish, however, to emphasize the following facts:

The original petition for composition or extension was allowed as filed in good faith. The proposals were not accepted by the creditors, but no suggestion of bad faith was made at the time the proposals were rejected. The amended petition was not objected to and was accepted by the District Court and an order of adjudication entered thereon under original subsection (s) of Section 75 of the Bankruptcy Act. This proceeding was not dismissed when original subsection (s) was held invalid, but was pending at the time the purported foreclosure sales were held under decrees in the State courts. The District Court denied the petitioners the benefits of subsection (s) as amended upon the basis of arbitrary findings that the composition and extension proposals were not made in good faith, and that the petitioners were unable to refinance within three years

or at all. Upon appeal from the orders denying petitioners possession of their property and the benefits of subsection (s), the Circuit Court of Appeals for the Ninth Circuit rendered a decision on May 2, 1939, affirming said orders. During the same term of the Circuit Court of Appeals, petitioners took steps to have the decision reviewed on certiorari. Certiorari was denied during the present term of court, whereupon petitioners promptly gave notice of their expectation that the Supreme Court would shortly render controlling decisions, by moving that the mandate be recalled and withheld. This motion was denied instantly, and shortly thereafter the decisions of the Supreme Court in *John Hancock Mutual Life Insurance Company* v. *Bartels, post,* and *Kalb* v. *Feuerstein, post,* were rendered. Petitioners then made prompt application for recall of the mandate and correction of the judgment on the basis of the errors of law established by those decisions. The application was denied and this appeal followed.

Summary of Argument.

Petitioners contend that the decision of the Circuit Court of Appeals of May 2, 1939, was erroneous in law, and that the error was established by the decisions of the Supreme Court in *John Hancock Mutual Life Insurance Company* v. *Bartels, post,* and *Kalb* v. *Feuerstein, post,* which held, contrary to the decision of the Circuit Court of Appeals, that the stay under subsection (s) of Section 75 is automatic rather than judicial, and that after the amended petition is accepted and approved, the benefits of subsection (s) may not be arbitrarily refused on the grounds of a bad faith proposal or inability to refinance. Petitioners further contend that the facts show timely application for correction of the error and that since sound discretion required the correction of the judgment failure to make the correction constitutes an abuse of discretion.

Petitioners accordingly contend that the Circuit Court of Appeals, in failing to recall the mandate and correct the judgment, decided questions of general law contrary to the weight of authority, and contrary to the decisions of the United States Supreme Court, and in so doing adhered to a decision squarely in conflict with the decisions of the United States Supreme Court interpreting the Federal law, to-wit, the Bankruptcy Act.

ARGUMENT.

Since the order sought herein to be reviewed was entered without any written opinion, the basis for the denial of petitioners' application to recall the mandate and correct the judgment is necessarily a matter of conjecture. However, there are only three possible grounds for denying the application, all of which must be assumed to have been resolved against petitioners. These grounds are, first, that the Circuit Court of Appeals had no jurisdiction to make the correction; second, that the application was not timely, or third, that the application lacked merit.

Point I.

First, with respect to jurisdiction, respondents themselves conceded that a court has inherent jurisdiction to correct its judgments and orders upon timely application. The Supreme Court of the United States has often reaffirmed this proposition. In *Wayne United Gas Co.* v. *Owens Illinois Glass Co.*, 57 Sup. Ct. Rep. 382, 300 U. S. 131; *United States* v. *Benz*, 51 Sup. Ct. 113, 282 U. S. 304, and many other cases it has been repeatedly held that a court has power and control over its judgments and orders to correct the same upon timely application made.

If the application to the Circuit Court of Appeals was denied for lack of jurisdiction, the order plainly violates a fundamental proposition of general law.

Point II.

Petitioners contend that as a proposition of general law and under the decisions of the United States Supreme Court and the Circuit Court of Appeals, their application to the Circuit Court of Appeals was timely.

While the proposition is often stated that a court retains jurisdiction over its judgments and orders during the term, such a statement is incomplete and must be qualified.

Thus in *Bronsen* v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797, the Supreme Court, while denying the relief prayed for because of a lapse of 17 years time, pointed out that the only judgments over which jurisdiction is lost by the expiration of the term are "final judgments", and that where steps are taken within the term to correct the error the judgment does not become final.

In the instant case, petitioners, during the term at which the decision was rendered, took steps to have the same reviewed upon certiorari, and the petition therefor was not denied until the present term. It therefore appears that the judgment of the Circuit Court of Appeals could not have become final until the present term, during which the application for recall and correction was made and denied.

The language of many decisions indicates that the time of issuance of the mandate of an appellate court is controlling. In the instant case the mandate was not issued until the present term.

In *Miocene Ditch Co.* v. *Campion*, 197 Fed. 497 (9th Circuit) this same Circuit Court of Appeals considered the time of issuance of the mandate as determinative, and where the term at which the mandate had issued had expired, held that the application was not timely.

In *Staude Mfg. Co.* v. *Labombarde*, 247 Fed. 879 (1st Circ.), the mandate had issued, and, after the expiration of the term, application was made for its recall and correction. Though the mandate had not been entered below, the

petition for recall was denied because the mandate had issued in the previous term. The court there cited Foster, Federal Practice, 4th Ed., p. 2149, for the proposition that mandates can be recalled during the term for correction but not afterwards.

In *Utah P. & L. Co.* v. *U. S.*, 242 Fed. 924, the mandate was recalled after the term, for correction to conform to an intervening Supreme Court decision.

In 5 C. J. S. Sec. 1996, the rule is stated that:

> "An appellate court generally has power to recall its mandate, at least during the term at which it was issued."

In the instant case the facts show that the application was made to the Circuit Court of Appeals during the term at which the judgment became final and during which the mandate issued. No intervening rights have been or can be shown. Since petitioners' application for correction was timely, its denial conflicts with the weight of authority and the decisions of this Court.

Finally, there is authority for the proposition that there are no terms in bankruptcy proceedings, and, if this be accepted, the question of timeliness (aside from *laches* which can have no application here) cannot be determined otherwise than as petitioners contend.

In *Sandusky* v. *National Bank*, 23 Wall. 289, 23 L. Ed. 155, the Supreme Court said:

> "A proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefits of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court for all purposes of its bankruptcy jurisdiction is always open. It has no separate terms. Its proceedings in any pending suit are therefore at all times open for reexamination upon application therefor in appropriate form. Any order made in the progress of

> the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

In re Glory Bottling Company of New York, Inc., 283 Fed. 110 (C. C. A. 2nd), the court said:

> "In bankruptcy proceedings the whole period from the filing of the petition to final disposition constitutes but one term."

In *Van Deveer* v. *Phillips and Buttorf*, 112 Fed. 966 (C. C. A. 5th), the court said:

> "In other proceedings the power of the Court to set aside its decrees on proper showing expires with the end of the term in which the decree is made. In bankrupt proceedings no such limitation obtains, or rather the whole period from the filing of the petition to the final settlement of the proceedings constitutes but one term."

If the order complained of must, as petitioners believe, be taken as holding that petitioners' application for correction was not timely, it squarely conflicts with the decisions noted.

Point III.

Petitioners contend that their petition and motion for recall of the mandate and correction of the judgment is meritorious in that the error of the decision of May 2, 1939, by the Circuit Court of Appeals has been clearly established. By denying the application, the Circuit Court of Appeals has in effect adhered to a decision squarely in conflict with the decisions of the United States Supreme Court interpreting the Bankruptcy Act, and particularly Section 75 thereof.

The gist of the decision of the Circuit Court of Appeals rendered on May 2, 1939, was that there was no stay in

effect at the time appellants' property was sold at foreclosure sale in the State courts, or at the expiration of the regular redemption period following such sale; that appellants were not entitled to the judicial stay under subsection (s) of Section 75 of the Bankruptcy Act for two reasons, (1) that appellants did not comply with the provisions of Section 75, and (2) that they were unable to refinance themselves within three years or at all; and that, therefore, the appellants were not entitled to the relief demanded.

It is pointed out in the opinion that the orders appealed from were based upon findings and that the evidence upon which the findings were based was not incorporated in the record. But, as a matter of fact, no testimony was ever taken nor hearing held upon which to base findings relative to ability to rehabilitate financially. However, as the Circuit Court of Appeals considers itself bound by these findings, it is important to an analysis of the opinion and a comparison with the *Bartels* case *supra;* to examine the exact language of these findings so far as they are material to the points in question.

The relevant portions are as follows:

Findings of Fact.

I.

That on the 19th day of December, 1934, Martin J. Bernards and Lena Bernards were, by order and judgment of this court, duly adjudicated bankrupts, and said bankrupts sought relief under the provisions of the "Frazier-Lemke" amendment, known as subdivision "s", Section 75 of the Act of Congress, known as the Bankruptcy Act.

XI.

That the said bankrupts have made no attempt to comply with the conditions required of them by the "Frazier-Lemke" amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied

with by them in order to obtain the right and privilege of a three year's stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules attached to their debtor's petition on file in this cause on a rental basis, as provided in subdivision (s) of Section 75 of the Bankruptcy Act.

XII.

That the said Martin J. Bernards and Lena Bernards, bankrupts, have never at any time submitted any proposal for a composition and extension which was an equitable and feasible plan for the liquidation of the claims of their secured creditors or other creditors which would result in the financial rehabilitation of the said bankrupts.

XIII.

That the said Martin J. Bernards and Lena Bernards at the time of the filing of the debtor's petition, on December 19th, 1934, and at all times, thereafter, have been in truth and in fact beyond all hope of financial rehabilitation and the only effect of further proceedings and delays on their behalf in this bankruptcy proceeding will be to postpone the inevitable liquidation of their financial affairs without benefit to them and resulting in great hardship to the creditors, preferred and common, of the said bankrupt.

XIV.

On account of the findings aforesaid, and by reason of other matters appearing in the record and files in this cause and which, by reference, are made a part of this answer, the bankrupts have shown and established that there has at no time since the inception of these bankruptcy proceedings, been any possibility of financial rehabilitation of the bankrupts; that they have been barred and precluded from the relief conditionally granted by sub-division (s) of Section 75 of the Bankruptcy Act.

Briefly it may be said that the Circuit Court of Appeals relied upon its interpretation of subsection (s) of Section 75, and footnote 6 to the case of *Wright* v. *Vinton Branch*, *supra*, and concluded therefrom that under the findings appellants were not entitled to relief.

On December 4, 1939, the Supreme Court of the United States rendered its decision in the case of *John Hancock Mutual Life Insurance Company* v. *Bartels*, *supra*. The facts there were that after adjudication under subsection (s) of Section 75, and after application for the benefits of said subsection, the adjudication was set aside and the debtor proceedings dismissed by the District Court, on the ground that the debtor had not made a good faith offer for a composition or extension and that there was no reasonable probability of the debtor's financial rehabilitation. On appeal, the Circuit Court of Appeals for the Fifth Circuit set aside the order dismissing the debtor's petition and directed that the proceedings be reinstated. In sustaining this decision of the Circuit Court of Appeals, the Supreme Court, speaking through Mr. Chief Justice Hughes, used the following language:

> At the hearing of the motion on April 5, 1938, the court received the evidence previously taken before the commissioner and additional testimony. Thereupon the motion was granted. The District Judge said in his opinion that the debtor had not made any proposal which could be construed as a "Good faith offer for an extension or composition" and hence the debtor was not entitled to be adjudged a bankrupt under subsection (s). The District Judge observed that the evidence was conflicting as to the value of the land (10 acres); that, separating the land from its improvements, certain of the debtor's witnesses placed its value at $70 an acre and the improvements at $5,000 or $6,000, while witnesses for the creditor valued the land at about $40 an acre and the improvements at about

$2,000.00. He thought that there was no reasonable probability of the debtor's financial rehabilitation. In that view the District Judge concluded "that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the case dismissed."

We think that the District Judge failed to follow the mandate of the statute and that the Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

The subsection of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.[3] Nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor because of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides. The only reference in Section 75 to good faith is found in subsection (i), which relates solely to the confirmation of proposals for composition or extension when the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided in the statute. That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct.

As Bartels' case thus fell within subsection (s), he amended his petition and asked to be adjudicated a bankrupt as that subsection permits. He was so adjudi-

[3] What is said upon this point in Note 6 in *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case *and is not supported by the terms of the statute.*

> cated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exception be set aside to him as provided by state law and that he be allowed to retain possession of his property under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder.
>
> The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.

By comparing this language with that of the decision of the Circuit Court of Appeals in the instant case, it immediately becomes apparent that the Circuit Court of Appeals approved the action of the District Court in refusing to grant appellants the benefits provided under subsection (s) on the grounds, that they did not comply with the provisions of Sec. 75, and that they were unable to refinance themselves within three years or at all, while in the *Bartels'* case the Supreme Court held that the District Court must follow the mandate of the statute and cannot refuse to grant the benefits of the subsection because the farmer-debtor offered to pay what he could, or because of the absence of a reasonable probability of his financial rehabilitation.

It is therefore submitted that the decision of the Circuit Court of Appeals is squarely in conflict with the law as expressed by the Supreme Court.

Some mention should here be made of the finding that "appellants did not comply with provisions of Sec. 75".

The findings of the District Court in this connection, hereinbefore quoted verbatim, indicate clearly that this must be considered in connection with, and relates solely to the offer of composition and extension made while under subsections (a) to (r). Should there be any doubt remaining on this score, reference to the record made in the District Court shows that appellants did everything that could be properly required of them, and that there is no foundation in the record for this indefinite finding except the questions of a good faith proposal. Petitioners challenge respondents to point out to the court any particular wherein appellants failed to meet the requirements of the act, except for the disputed matters of good faith and financial rehabilitation which have both been disposed of by the *Bartels'* decision.

In *Kalb* v. *Feuerstein, supra*, the Supreme Court states with unmistakable clarity that at all times and under all circumstances (except where express permission of the bankruptcy court is obtained) the exclusive jurisdiction over the property of a farmer-debtor rests in the bankruptcy court and the State courts are powerless to proceed. The Circuit Court of Appeals in its decision of May 2, 1939, relied on the case of *Hardt* v. *Kirkpatrick*, 91 F. (2d) 875, referred to in the opinion for the proposition that the only stay under subsection (s) of Section 75 of the Bankruptcy Act, was a judicial stay. The decision in the *Kalb* case clearly vitiates the decision in the *Hardt* case in the following language:

> "As stated by the Senate Judiciary Committee in reporting these amendments: '* * * subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be * * *'
>
> "'* * * By reading subsection (n) to (o) as now amended in this bill, it becomes clear that it was the intention of Congress when it passed section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and

that the benefits of the act should extend to the farmer prior to the confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise.

"• • • In harmony with the general plan of giving the farmer an opportunity of rehabilitation, he was relieved—after filing a petition for composition and extention—of the necessity of litigation elsewhere and its consequent expense. *This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.*"

Trustee Order Appealed.

The Circuit Court of Appeals for the Ninth Circuit in its decision of May 2, 1939, held that the order of the District Court approving trustee entered on December 15, 1936 was not appealed from and became final on January 15, 1937. Petitioners contend that the conciliation commissioner and the District Court were without jurisdiction to appoint a trustee because the act does not provide for a trustee in the instant case, and therefore the orders of August 8, 1936 and December 15, 1936 were void. However, should the court hold that the order of December 15, 1936 to be voidable and required appeal within thirty days then petitioners maintain that their petition diligently filed on January 4, 1937 with the conciliation commissioner before any intervening rights had accrued, and before the thirty days appeal period had expired, asking for removal of trustee, which petition was denied on January 11, 1937 and a review taken to the District Court on January 29, 1937, where it was affirmed on May 10th, 1938 properly retained jurisdiction of the issue. In support of this we quote from the Su-

preme Court decision in *Wayne United Gas Co.* v. *Owens Illinois Glass Co. et al., supra.*

> "Bankruptcy court in exercise of sound discretion if no intervening rights will be prejudiced by its action, may grant rehearing on application, diligently made, and rehear case on merits, and even though it reaffirms its former action and refuses to enter decree different from original one, order entered on rehearing is appealable and time for appeal runs from its entry."

By adhering to the decision of May 2, 1939, the Circuit Court of Appeals has shown flagrant disregard for the edict of the Supreme Court and for petitioners' right to justice. After six years in court, battling for their rights, petitioners' position was finally and uncontrovertably vindicated by the Supreme Court decisions hereinabove referred to. But petitioners' victory is empty unless they may have the benefits thereof. Under these circumstances denial of petitioners' right for want of an earlier expression by the Supreme Court would be a travesty on justice when, in the exercise of sound discretion, the error and injustice may be corrected.

Petitioners respectfully submit that their petition for certiorari should be granted.

MARTIN J. BERNARDS,
LENA BERNARDS,
Petitioners Pro Se.

APPENDIX.

Section 75, Bankruptcy Act, Agricultural Compositions and Extensions, 11 U. S. C. A., Sec. 203.

Subsection (n).

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under (this section) section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been filed and

a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same in the clerk or court.

Subsection (o).

"Except upon petition made to and granted by the Judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court.

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recession, or specific performance of any agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale or other proceeding under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

Subsection (s).

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bank-

rupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act; Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a

period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semi-annually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: PROVIDED, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court,

less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: PROVIDED, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer

debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court, and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.